

A Dynaworth Shipping Sdn Bhd v Ling Chung Ann

HIGH COURT (MIRI) — ORIGINATING MOTION NO 25-03 OF 2000 (MR)
SULAIMAN DAUD JC
14 MARCH 2001

B *Civil Procedure* — Costs — Interlocutory order for — Whether constituted judgment debt

Civil Procedure — Injunction — Injunction to restrain presentation of winding up petition — Whether plaintiff had a cause of action against defendant — Whether there is a judgment debt — Balance of convenience

C *Civil Procedure* — Originating motion — Proceedings wrongly commenced by originating motion — Whether nullity or mere irregularity — Rules of the High Court 1980 O 2 r 1(3)

D *Companies and Corporations* — Winding up — Injunction to restrain petition — Whether judgment debt due — Whether debtor had to wait until actual petition for winding up is filed and served

E The defendant claimed against the plaintiff in the sessions court for an alleged outstanding salary. On an application by the plaintiff in the sessions court, the learned sessions court judge struck out the defendant's statement of claim with costs. On appeal by the defendant, the High Court allowed the appeal with costs. The defendant proceeded with the taxation of the costs awarded by the High Court. The plaintiff had since applied to the Court of Appeal for leave to appeal against the decision of the High Court. Upon the plaintiff's failure to pay such taxed costs, the defendant served on the plaintiff a statutory notice under s 218 of the Companies Act 1965. In response thereto, the plaintiff by an originating motion to the High Court in this action, applied for a prohibitory injunction to be issued against the defendant, his agent or servants or otherwise that they or he be prohibited or be restrained from applying to the court by way of petition under s 218 for a winding up proceedings against the plaintiff company. The issues for determination were: (i) whether the plaintiff had a cause of action against the defendant in respect of the prayer sought; (ii) whether there was any money due and payable from the plaintiff to the defendant as a judgment debt for the purpose of s 218(e); and (iii) the balance of convenience or justice of the case. At the commencement of the hearing of the originating motion, counsel for the defendant raised a preliminary objection on the process adopted by the plaintiff in filing the application.

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Held, allowing the plaintiff's application with costs:

I (1) Notwithstanding the decision in *Lee Phet Boon v Hock Thai Finance Corp Bhd* [1994] 2 MLJ 448, the mere fact that the application was begun by way of originating motion and not

originating summons should only be treated as an irregularity and would not nullify the proceedings. This was clearly provided in O 2 r 1 of the Rules of the High Court 1980 (see p 404F–G).

- (2) Under the said O 2 r 1(3) of the RHC, it is clearly provided that where any proceedings was begun by an originating process other than the one employed, such proceedings are not void and will not be wholly set aside. ‘Proceedings’ for the purpose of this rule, include any application to the court. The fact that this proceedings were begun by originating motion and not by originating summons did not cause any embarrassment or injustice to the defendant or prejudiced the defendant’s case. For the reasons stated the court overruled the preliminary objection (see p 405C–E).

- (3) In the present case, there exists a pre-existing cause of action on the part of the plaintiff against the defendant arising out of a statutory demand under s 218 of the Companies Act 1965 to present a winding up petition. Where a company wishes to defend a threatened petition for winding up, one of the process which may be initiated by the company if it has notice that a petition will or may be presented against it, is to make an application to restrain the presentation of such petition. The plaintiff does not have to wait for the actual petition for winding up to be filed and served on him as by that time damage may have been done (see pp 406H–407A).

- (4) The threat by the defendant of such winding up petition also constitutes a factual situation the existence of which entitles the plaintiff to obtain from the court a remedy against another. As such it falls within the definition of ‘cause of action’ as defined by Lord Diplock in *Letang v Cooper* [1965] 1 QB 232 (see p 407A–B).

- (5) In the present case the costs in question was awarded by the High Court on an appeal from the decision of the sessions court in respect of an interlocutory matter. Even if the plaintiff’s application for leave to the Court of Appeal is not allowed or, if allowed, the appeal is dismissed, the case still has to be reverted to the sessions court for full trial and hearing. In other words the decision of the High Court in which the said costs was ordered is not a final determination of the cause or matter before the court. The principle laid down in *Hai Yue Hin v Public Feedmill (M) Sdn Bhd* [1997] 3 MLJ 730 should also be applicable to costs awarded in an appeal arising out of an interlocutory proceedings or matter as in the instant case. Such taxed costs in the absence of any order for it to be paid forthwith should only be settled at the end of the action. It will only crystallize into a judgment upon the final disposal of the proceedings unless ordered otherwise in the course or at the conclusion of the proceedings relating to the suits (see p 409B–E).

- A (6) The justice of this case is such that the harm that would result in the refusal of the grant of the injunctions sought outweigh the harm that would result from their grant (see p 409E–F).

[Bahasa Malaysia summary]

- B Defendan menuntut terhadap plaintif dalam mahkamah sesyen bagi gaji yang didakwa masih belum dijelaskan. Atas permohonan oleh
- C plaintif dalam mahkamah sesyen, hakim mahkamah sesyen yang arif telah membatalkan pernyataan tuntutan defendan dengan kos. Atas rayuan oleh defendan, Mahkamah Tinggi telah membenarkan rayuan tersebut dengan kos. Defendan telah meneruskan penetapan kos yang diberikan oleh Mahkamah Tinggi. Plaintif telah sejak itu memohon kepada Mahkamah Rayuan untuk mendapatkan kebenaran bagi merayu terhadap keputusan Mahkamah Tinggi. Atas kegagalan plaintif untuk membayar kos yang ditetapkan sedemikian, defendan telah menyampaikan ke atas plaintif notis berkanun di bawah s 218 Akta Syarikat 1965. Akibatnya, plaintif melalui satu usul pemula kepada Mahkamah Tinggi dalam tindakan ini, telah memohon supaya satu injunksi larangan dikeluarkan terhadap defendan, ejen atau pekerjaanya atau sebaliknya bahawa mereka atau beliau dilarang atau dihalang daripada memohon kepada mahkamah melalui petisyen di bawah s 218 untuk satu prosiding penggulungan terhadap syarikat plaintif. Isu-isu untuk penentuan adalah: (i) sama ada plaintif mempunyai kausa tindakan terhadap defendan berhubung remedi yang dipohon; (ii) sama ada terdapatnya sebarang wang yang kena dibayar dan terhutang oleh plaintif kepada defendan sebagai hutang penghakiman bagi tujuan s 218(e); dan (iii) imbalan keselesaan atau keadilan kes tersebut. Ketika permulaan pembicaraan usul pemula,
- F peguam bagi pihak defendan telah membangkitkan bantahan awal ke atas proses yang diterima-pakai oleh plaintif dalam pemfailan permohonan tersebut.

- G **Diputuskan**, membenarkan permohonan plaintif dengan kos:

- H (1) Meskipun keputusan di dalam *Lee Phet Boon v Hock Thai Finance Corp Bhd* [1994] 2 MLJ 448, fakta bahawa permohonan tersebut telah dimulakan melalui usul pemula dan bukannya saman pemula tidak seharusnya dianggap sebagai suatu luar aturan dan tidak seharusnya membatalkan prosiding tersebut. Ini jelas diperuntukan dalam A 2 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 (lihat ms 404F–G).
- I (2) Di bawah A 2 k 1(3) KMT, jelas diperuntukan bahawa di mana sebarang prosiding dimulakan oleh satu proses pemula yang selain daripada yang digunakan, prosiding yang sedemikian adalah tidak batal dan tidak akan diketepikan sesungguhnya. ‘Prosiding’ bagi tujuan kaedah ini yang telah dimulakan oleh usul

pemula dan bukannya melalui saman pemula tidak menyebabkan sebarang perasaan malu atau ketidakadilan kepada defendan atau memudaratkan kes defendan. Atas alasan-alasan yang dinyatakan mahkamah telah menolak bantahan awal tersebut (lihat ms 405C–E).

- (3) Dalam kes semasa ini, terdapatnya kausa tindakan yang para wujud di pihak plaintif terhadap defendan yang berbangkit daripada tuntutan statutori di bawah s 218 Akta Syarikat 1965 untuk mengemukakan satu petisyen penggulungan. Di mana sesebuah syarikat ingin membela sesuatu petisyen untuk penggulungan yang tergugat, salah satu proses yang boleh dimulakan oleh syarikat tersebut jika ianya mempunyai notis bahawa sesuatu petisyen akan atau boleh dikemukakan terhadapnya, adalah untuk membuat satu permohonan untuk menghalang pengemukakan petisyen yang sedemikian. Plaintif tidak perlu menunggu untuk petisyen sebenar untuk penggulungan difailkan dan disampaikan ke atas beliau kerana pada waktu itu kemudahan telah pun berlaku (lihat ms 406H–407A).
- (4) Ugutan oleh defendan mengenai petisyen penggulungan sedemikian juga membentuk satu situasi faktual yang mana kewujudannya memberikan plaintif hak untuk memperolehi daripada mahkamah satu remedi terhadap pihak yang lain. Oleh yang demikian, ia terlingkung di dalam definisi ‘kausa tindakan’ seperti yang ditakrifkan oleh Lord Diplock dalam *Letang v Cooper* [1965] 1 QB 232 (lihat ms 407A–B).
- (5) Dalam kes semasa, kos yang dipersoalkan telah diberikan oleh Mahkamah Tinggi ke atas sesuatu rayuan daripada keputusan mahkamah sesyen berhubung dengan suatu perkara interlokutori. Walaupun jika permohonan plaintif untuk kebenaran kepada Mahkamah Rayuan tidak dibenarkan, atau, jika dibenarkan, rayuan tersebut adalah ditolak, kes tersebut masih kena dikembalikan kepada mahkamah sesyen untuk perbicaraan dan pembicaraan penuh. Dalam ertikata lain, keputusan Mahkamah Tinggi dalam yang mana kos tersebut telah diperintahkan bukannya merupakan penentuan muktamad akan kausa atau perkara tersebut di hadapan mahkamah. Prinsip yang dibentangkan dalam *Hai Yue Hin v Public Feedmill (M) Sdn Bhd* [1997] 3 MLJ 730 haruslah juga boleh dipakai kepada kos yang diberikan dalam sesuatu rayuan yang berbangkit daripada prosiding interlokutori atau perkara sepertimana dalam kes semasa. Kos yang ditetapkan sedemikian dalam ketiadaan sebarang perintah bagi ianya dibayar segera haruslah hanya dijelaskan pada penghujung tindakan. Ianya akan hanya membentuk menjadi suatu penghakiman setelah pelupusan muktamad prosiding tersebut kecuali diperintahkan sebaliknya ketika perjalanan atau pada kesimpulan prosiding berkaitan dengan guaman tersebut (lihat ms 409B–E).

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- A (6) Keadilan kes ini adalah sedemikian bahawa kemudaran yang akan disebabkan dalam keengganan memberikan injunksi yang dipohon melebihi kemudaran yang akan disebabkan daripada pemberiannya (lihat ms 409E–F).]

B **Notes**

For cases on costs in interlocutory proceedings, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1277–1280.

For a case on injunction to restrain presentation of winding up petition, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2025.

- C For a case on proceedings wrongly commenced by originating motion, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 3169.
For a case on injunction to restrain petition, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) para 883.

D **Cases referred to**

Arab Malaysian Corp Builders Sdn Bhd & Anor v ASM Development Sdn Bhd [1998] 6 MLJ 136 (refd)

Cartwright & Anor v Baker [1975] 2 All ER 970 (refd)

Liau Kim Lian v Bajuria [1971] 1 MLJ 276 (refd)

- E *Lim Chong Construction Co Sdn Bhd v Silam Quarry Sdn Bhd* [1990] 2 MLJ 423 (refd)

Hai Yue Hin v Public Feedmill (M) Sdn Bhd [1997] 3 MLJ 730 (refd)

Harkness v Bell's Abestos & Engineering Ltd [1967] 2 QB 729 (refd)

Instrumech Engineering Sdn Bhd v Sensorlink Sdn Bhd [2001] 1 MLJ 127 (refd)

- F *Isyoda (M) Sdn Bhd v Low Seong Tek* [2000] 6 MLJ 454 (refd)
Lee Phet Boon v Hock Thai Finance Corp Bhd [1994] 2 MLJ 448 (refd)
Letang v Cooper [1965] 1 QB 232 (refd)
Malayan Flour Mill Bhd v Raja Lope & Tan Co [2000] 6 MLJ 591 (refd)

- G *Salak Park Development Sdn Bhd v Fajar Menyensing Sdn Bhd* [1994] AMR 2554 (refd)

Stonegate Securities Ltd v Gregory [1980] 1 All ER 241 (refd)

Legislation referred to

- H Companies Act 1965 s 218(e)
Rules of the High Court 1980 O 2 r 1(2), (3), O 5 r 5, O 59 r 4

Tai Choi Yu (Tai Choi Yu & Co) for the plaintiff.

Bong Ah Loi (Bong & Co) for the defendant.

- I **Sulaiman Daud JC.** : By an originating motion dated 8 November 2000, the plaintiff applied for a prohibitory injunction to be issued against the defendant, his agent or servants, or otherwise that they or he be prohibited or be restrained from applying to the court by way of petition under s 218

of the Companies Act 1965 ('the Act') for winding up proceedings against the plaintiff company. The matter was heard on 18 January 2001 and on 2 February 2001, I delivered my brief summary judgment where I made an order in terms of the originating motion and indicated that full written judgment would be issued on appeal. As the defendant had appealed against the said decision, I now give my full written judgment.

The preliminary objections

At the commencement of the hearing of the originating motion, counsel for the defendant raised a preliminary objection on the process adopted by the plaintiff in filing the application. The learned counsel submitted that, as provided in O 5 r 5 of the Rules of the High Court 1980 ('the RHC'), proceedings may only be begun by originating motion if, but only if, these rules or by or under any written law, the proceedings in question are required or authorized to be so begun. He further submitted that since there is no provisions under the RHC or any other written law that requires or authorize proceedings in respect of prohibitory injunctions to be so begun, the plaintiff has adopted the wrong procedure and that the application should be dismissed on this ground alone.

The learned counsel in support of such proposition referred to the case of *Lee Phet Boon v Hock Thai Finance Corp Bhd* [1994] 2 MLJ 448. In that case, the plaintiff applied by way of originating motion to set aside two orders concerning the sale of land. One of the preliminary objections raised by the defendant to the application was on the process adopted by the plaintiff in filing such an application. It was submitted it should be by way of summons instead of by motion. The learned judge agreed with such submission and allowed the preliminary objections raised. In the instant application, the learned counsel for the defendant also referred to the cases of *Isyoda (M) Sdn Bhd v Low Seong Tek* [2000] 6 MLJ 454 and *Instrumech Engineering Sdn Bhd v Sensorlink Sdn Bhd* [2001] 1 MLJ 127 as example of cases where applications for a prohibitory injunction were made by way of originating summons. Notwithstanding the decision in *Lee Phet Boon's* case, in my view, the mere fact that the application was begun by way of originating motion and not originating summons should only be treated as an irregularity and would not nullify the proceedings. This is clearly provided in O 2 r 1 of the RHC which reads as follows:

- (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
- (2) Subject to para (3) the court may, on the ground that there has been such a failure as is mentioned in para (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any steps taken in those proceedings or any document, judgment or order therein or exercise its

A powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealings with the proceedings generally as it thinks fit.

(3) The court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.

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The aforesaid rules clearly provide that any failure to comply with the requirements of the RHC shall be treated as an irregularity and shall not nullify the proceedings unless set aside by the court, wholly or in part, as irregular on an application under O 2 r 1(2) of the RHC. However, the

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powers of the court under the said O 2 r 1(2) of the RHC to set aside any proceedings by reason of irregularity is subject to the provisions of O 2 r 1(3) of the RHC. Under the said O 2 r 1(3) of the RHC, it is clearly provided that where any proceedings were begun by an originating process other than the one employed, such proceedings are not void and will not be wholly set aside. 'Proceedings' for the purpose of this rule include any

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application to the court (see *Harkness v Bell's Abestos & Engineering Ltd* [1967] 2 QB 729). From the aforesaid provisions, it is clear to me that this application which was made by way of originating motion instead of originating summons are not void and will not be wholly set aside (if set aside at all). I am also of the view that the fact that this proceedings were begun by originating motion and not by originating summons did not cause any embarrassment or injustice to the defendant or prejudiced the defendant's case. For the reasons stated, I overruled the preliminary objection.

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The facts and circumstances giving rise to this application can be briefly stated. By summons filed in the session court, the defendant herein (being the plaintiff therein) claimed against the plaintiff herein (being the defendant therein) the sum of RM148,580 for alleged outstanding salary. On 8 November 1997, the learned session court judge, on application by the defendant therein (being the plaintiff herein), struck out the statement of claim with costs. On appeal, the High Court allowed the appeal with costs. The defendant proceeded with the taxation of the costs awarded by the High Court. By a final registrar's certificate dated 7 August 2000, the learned senior assistant registrar ('the SAR') taxed the costs at RM9,895.40 to the defendant and ordered the same to be paid by the plaintiff together with interest thereon at 8%pa from 4 February 1999 until full payment ('the taxed sum').

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The plaintiff has since applied to the Court of Appeal for leave to appeal against the decision of the High Court. Upon the plaintiff's failure to pay such taxed costs, the defendant had by a letter dated 30 September 2000, through its counsel, served on the plaintiff a statutory notice under s 218 of the Act demanding the full payment of the taxed costs amounting to RM11,149 (inclusive of interests) within three weeks from the date of receipt thereof, failing which the defendant would commence winding up proceedings against the plaintiff. In response thereto, the plaintiff filed in this application.

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On the facts as aforesaid, three issues arose for determination, that is to say:

- (a) whether the plaintiff had a cause of action against the defendant in respect of the prayer sought;
- (b) whether there was any money due and payable from the plaintiff to the defendant as a judgment debt for the purpose of s 218(e) of the Companies Act;
- (c) The balance of convenience or justice of the case.

Whether the plaintiff had a cause of action

The first ground raised by the learned counsel for the defendant for dismissing this application was that an application for an injunction required the existence of a cause of action. In support thereof, he cited several cases including *Arab Malaysian Corp Builders Sdn Bhd & Anor v ASM Development Sdn Bhd* [1998] 6 MLJ 136, and the case of *Lim Chong Construction Co Sdn Bhd v Silam Quarry Sdn Bhd* [1990] 2 MLJ 423. In *Arab Malaysian Corp Builders Sdn Bhd & Anor v ASM Development Sdn Bhd*, the plaintiffs applied for an injunction to restrain the defendant from deducting liquidated and ascertained damages from sums certified as due to the plaintiffs under a building contract entered into by the parties until the final determination of the defendant's entitlement to deduct had been ascertained by arbitration. The learned judge held that any application for an injunction required the existence of a cause of action and the mere fact that a party can apply for an injunction is in itself not a cause of action. In *Lim Chong Construction Co Sdn Bhd v Silam Quarry Sdn Bhd*, the plaintiff filed a writ of summons with only a general endorsement and then proceeded to obtain an interlocutory injunction against the defendant. The writ was never served and the defendant applied to set aside the injunction and struck out the writ and the endorsement thereon. On the grant of an injunction, Zakaria Yatim J (as he then was) stated at p 424:

Since a trial is envisaged the plaintiff must show that he has a cause of action. The grant or refusal of an interlocutory injunction therefore depends on whether there is a cause of action.

Based on the aforesaid authorities, the learned counsel for the defendant submitted that the plaintiff's application, seeking the prohibitory injunction solely, ought to be dismissed on the ground that the plaintiff does not have a pre-existing cause of action against the defendant for substantial relief, as in the instant, there was no invasion of the plaintiff's legal or equitable right. With respect, I do not agree with such a contention. In the present case, I am of the view that there existed a pre-existing cause of action on the part of the plaintiff against the defendant arising out of a statutory demand under s 218 of the Act to present a winding up petition. In the case of *Stonegate Securities Ltd v Gregory* [1980] 1 All ER 241, it was held that a statutory demand was a threat to a winding up petition. Where a company wishes to defend a threatened petition for winding up, one of the processes which may be initiated by the company if it has notice that a petition will or

- A may be presented against it, is to make an application to restrain the presentation of such a petition (see 7(3) *Halsbury of England* (4th Ed, 1966 Reissue) at p 1552 para 2211). The plaintiff does not have to wait for the actual petition for winding up to be filed and served on him as by that time damage may have been done (see *Instrumech Engineering Sdn Bhd v Sensorlink Sdn Bhd* at p 139). I am also of the view that the threat by the
- B defendant of such winding up petition also constitutes a factual situation, the existence of which entitles the plaintiff to obtain from the court a remedy against another. As such, it falls within the definition of 'cause of action' as defined by Lord Diplock in *Letang v Cooper* [1965] 1 QB 232 at p 242.

- C With regard to the two cases earlier referred to by the learned counsel for the defendant, in my view, the facts in those cases are readily distinguishable from the instant case. In those cases, there were no threats or invasion of the plaintiffs' legal or equitable right, as in the instant case. In *Lim Chong Construction Co Sdn Bhd v Silam Quarry Sdn Bhd*, the injunctions sought were to restrain the defendant from claiming a banker guarantee given by the plaintiff to the defendant. Likewise, in *Arab Malaysian Corp Builders Sdn Bhd & Anor v ASM Development Sdn Bhd*, the injunction sought was to restrain the defendant from deducting liquidated and ascertained damages under a building contract entered between the parties. It is clear to me that in both cases, the injunction sought were to preserve the status quo pending the ascertainment by the court of the rights of the
- D parties as distinct from the injunction sought in the instant case to restrain the defendant from doing or threatening to do an act which is calculated to cause damage to the plaintiff.
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- F For the reason above stated, I hold that there exists in the instant case a factual situation which entitles the plaintiff to obtain from the court the injunction sought against the defendant.

Whether there is any money due from the plaintiff to the defendant as judgment debt

- G On this issue, the learned counsel for the plaintiff submitted that taxed costs are not judgment debts and that all taxed costs are paid and settled on the final determination of the case or court proceedings, unless the taxed costs are ordered to be paid forthwith. He further submitted that for taxed costs to be paid before the final determination of the case or court proceedings, the party demanding such payment must apply for an order of the court seeking payment. According to the learned counsel, there is no final determination of the suit in question since there is an appeal pending in relation thereto in the Court of Appeal. The learned counsel added that even if the said appeal was disallowed, the case has to be reverted to the sessions court for the pending direction and the full trial or hearing of the
- H case.
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In support of his contention that such taxed costs should only be paid after the final determination of the suits, the learned counsel cited the case

of *Hai Yue Hin v Public Feedmill (M) Sdn Bhd* [1997] 3 MLJ 730. In that case, an application for summary judgment made by the respondent was dismissed with costs by the learned SAR. The notice of appeal was dismissed with costs. Although leave was granted to the respondent, an appeal was never filed. In delivering the decision of the Court of Appeal on the interpretation of O 59 r 4 of the RHC, Shaik Daud Ismail JCA (as he then was) stated at p 734:

Having given our utmost consideration to the arguments and the authorities cited, we agree and adopt the interpretation given in the two decisions in *Chow Yong Hong* and *Ko Ko Ma Pony Horse Centre*, as being the more proper and true interpretation of O 59 r 4(1). To hold otherwise would make nonsense of the wording of the Order itself, which, as stated earlier, is clear as day. It is only when the court thinks fit to order the costs to be paid by the plaintiff forthwith that it should be so paid, otherwise it should follow the general rule in interlocutory proceedings and paid only at the conclusion of the action.

The next case cited by the learned counsel is *Cartwright & Anor v Baker* [1975] 2 All ER 970, where it was held that in the case of costs, the effective judgment is the decree of the court itself ordering costs to be paid, not the certificate quantifying them at a given figure. Likewise, he argued in the instant case the Final Registrar's Certificate dated 7 August 2000 was not a judgment or an order for the payment of money. The learned counsel further argued that since the taxed costs were not due and payable upon the final determination of the suits, the statutory notice for the winding up order served by the defendant to the plaintiff was in reality intended to pressurize the plaintiff and the court has the inherent jurisdiction to prevent the abuse of process by way of an injunction. For such a contention, he referred to several cases, including *Salak Park Development Sdn Bhd v Fajar Menyensing Sdn Bhd* [1994] AMR 2554 and *Malayan Flour Mill Bhd v Raja Lope & Tan Co* [2000] 6 MLJ 591.

The learned counsel for the defendant, on the other hand argued that the facts of the case of *Hai Yue Hin v Public Feedmill (M) Sdn Bhd* can be distinguished from the present case as that case involved the payment of costs pursuant to an interlocutory application, whereas the present case relates to costs obtained upon appeal from the sessions court to the High Court. The learned counsel submitted that an order obtained in an appeal from the lower court to the High Court is a final order and not an interlocutory order. In answer to the contention of the plaintiff's counsel that taxed costs are not judgment debt, the learned counsel referred to the case of *Liau Kim Lian v Bajuria* [1971] 1 MLJ 276 where it was held that an order for payment of costs is tantamount to an order for the payment of such amount of money as may be ascertained on taxation, which to a large extent is similar to a judgment for damages to be assessed. The learned counsel also relied on the case of *Ho Yoke Kwei & Anor v Ong Eng Hin* [1997] 4 AMR 4078 in support of her submission that the defendant is entitled to be paid taxed costs forthwith and not until the end of the case notwithstanding the omission of the words 'to be paid forthwith'.

A Order 59 r 4(1) of the RHC, which deals with costs, provides as follows:

Costs may be dealt with by the court at any stage of the proceedings; or after the conclusion of the proceedings; and any order of the court for the payment of any costs may, if the court thinks fit, require the costs to be paid forthwith notwithstanding that the proceedings have not been concluded.

B It is clear that the case of *Hai Yue Hin v Public Feedmill (M) Sdn Bhd* involved the interpretation of the said O 59 r 4(1) of the RHC in relation to costs awarded in interlocutory proceedings, whereas in the present case, the costs in question were awarded by the High Court on an appeal from the decision of the sessions court in respect of an interlocutory matter. The said appeal arose from the order of the sessions court striking out the defendant's claim (being the plaintiff therein) where the High Court gave judgment in favour of the defendant. Even if the plaintiff's application for leave to the Court of Appeal is not allowed or, if allowed, the appeal is dismissed, the case still has to be reverted to the sessions court for full trial and hearing. In other words, the decision of the High Court in which the said costs was ordered is not a final determination of the cause or matter before the court.

D In my view, the principal laid down in *Hai Yue Hin v Public Feedmill (M) Sdn Bhd* should also be applicable to costs awarded in an appeal arising out of interlocutory proceedings or matter, as in the instant case. I therefore agree with the learned counsel for the plaintiff that such taxed costs in the absence of any order for it to be paid forthwith should only be settled at the end of the action. In other words, it will only crystallize into a judgment debt upon the final disposal of the proceedings, unless ordered otherwise in the course of or at the conclusion of the proceedings relating to the suits.

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F Having weighed the factors abovementioned, I find that the justice of this case is such that the harm that would result in the refusal of the grant of the injunctions sought outweighs the harm that would result from their grant. The further conduct of this proceedings, if leave to appeal is allowed, will depend on the decision of the Court of Appeal. If the appeal is allowed, then the order of the sessions court in setting aside the plaintiff's statement of claim will be restored and the order as to costs made by the High Court may be reversed.

G Upon careful consideration of the arguments and the authorities cited and to prevent an abuse of the process of the court, I am of the view that this is a proper case for granting the injunction applied by the plaintiff. In the circumstances, I allow the plaintiff's application with costs.

Plaintiff's application allowed with costs.

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Reported by Moy Saw Han

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